No. 658

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IN THE

Supreme Court of the United States

OCTOBER TERM—1944

ABRAHAM JESKOWITZ,

Petitioner,

against

LEONARD H. CARTER, Trustee in Bankruptcy of Union Fabrics, Inc.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Prior Proceedings Herein

On February 23, 1943, Referee Peter B. Olney made an order directing petitioner, president of the bankrupt, Union Fabrics, Inc., to turn over to the trustee the following property of the bankrupt (R* 23a, 24a):

* Numbers in parentheses preceded by "R" refer to pages in record. Numbers in parentheses preceded by "SM" refer to pages in the stenographer's minutes.

1. Certain merchandise consisting of silk, rayon and other textiles of the cost value of $69,921.24, or the proceeds thereof; and

2. $875, the proceeds of a diamond ring pledged as collateral with the bankrupt and converted by appellant; and

3. The books and records of the bankrupt consisting of all its merchandise inventory sheets for the years 1937, 1938 and 1939, its journal for the year 1938, and its general ledger and purchase invoices for the year 1937.

On May 6, 1943, the order of the Referee was confirmed, upon petitioner's petition to review, by the United States District Court, for the Southern District of New York (R 5a-6a).

On July 21, 1944, the Circuit Court of Appeals, Second Circuit, unanimously affirmed the order of the District Court (R 85a-86a).

Opinions were written by the Referee (R 25a-30a), the District Court (R 7a-11a) and the Circuit Court (R 79a-84a). The opinion of the Circuit Court is reported at 144 F. 2d 39.

Statement of the Case

Respondent controverts the statement of facts contained in the petition. Respondent respectfully refers the Court to the opinion of the Circuit Court for a full and fair statement of the facts.

For present purposes, it will be sufficient to set forth a tabular summary which was contained in the Referee's opinion, which summary was quoted in the opinion of the Circuit Court of Appeals. It is as follows (R 26a):

"Bankrupt had merchandise on hand on January 1st, 1939 of the value of	$194,785.05	
(Financial Statement, Trustee's Exhibit 1, 10/24/41)		
Merchandise was purchased during period from January 1st, 1939 to September 28th, 1939, net....	218,351.91	
Total merchandise to be accounted for.....		$413,136.96
Less: Cost of merchandise sold during period January 1st, 1939 to September 28th, 1939, assuming sales at not less than cost for though respondent, Jeskowitz, had testified at an adjourned first meeting that the sales price represented a markup of 10% gross (Trustee's exhibit 12, adjourned 1st mtg. October 24th, 1941, pp. 36-38) the respondent I find to be wholly unworthy of belief and therefore no testimony by him can be given any credence, on the other hand the witness, Gelbart, who gave testimony of sales below cost was proved to be totally unreliable and utterly unworthy of belief (See Bankruptcy Act Section 21-L*)	322,587.36	
Merchandise on hand September 28th, 1939 (S. M. 322-4).....	20,628.36	343,215.72
Shortage as of September 28th, 1939.....		$ 69,921.24"

* Section 21-L of the Bankruptcy Act provides as follows:

"In any proceeding under this Act against a bankrupt for an accounting by him for his property or the disposition thereof, or to compel a turn-over of property by him, if his books, records, and accounts shall fail to disclose the cost to him of such property sold by him during any period under consideration, it shall be presumed, until the contrary shall appear, that such property was sold at a price not less than the cost thereof to him."

The correctness of none of the above figures was ever disputed in the prior proceedings herein until the filing of the present petition for a writ of certiorari. Petitioner complains at pages 4, 5 and 7 of his petition that the Referee accepted the starting inventory figure of $194,785.05, which was contained in a financial statement signed by appellant (SM 321), "even though evidence was offered to show that there were many errors and omissions totalling approximately 113,000 yards of merchandise in the inventory record." There was not as much as a suggestion in the evidence offered on behalf of the petitioner that this starting inventory figure was otherwise than accurate or was based upon any erroneous inventory records. Quite to the contrary, the testimony of the petitioner clearly showed that the inventory figure in question contained in the financial statement was based upon a physical inventory (SM 29-30, 42-43, 49, 91, 100, 108, 129, 199 and 448).

The petitioner now complains that the Referee erred in applying the presumption provided for in Section 21L of the Bankruptcy Act. No such complaint was ever addressed to the Referee, to the District Court or to the Circuit Court of Appeals. The propriety of the application of the presumption was acquiesced in before the Referee by the petitioner who proceeded to attempt to sustain the burden cast upon him by Section 21L of the Bankruptcy Act of proving that the merchandise was sold below cost. The basis of petitioner's present complaint that the Referee erred in applying the presumption of Section 21L of the Bankruptcy Act is that it is claimed that the books and records in evidence before the Referee were sufficient for the purpose of showing the cost price of the merchandise sold between January 1, 1939 and September 28, 1939 (pp. 5, 6, 11 and 12 of the Petition). The trustee took the position that he was unable to prove the cost of the merchandise sold because of the absence of certain necessary books and records of the bankrupt. The Referee found, and the finding has

been confirmed by the District Court and the Circuit Court of Appeals, that the petitioner had in his possession the following books and records belonging to the bankrupt: Journal for the year 1938, General Ledger for the year 1937, all inventory sheets for the years 1937, 1938 and 1939, and purchase invoices for the year 1937 (R 23a-24a). The petitioner does not now question the correctness of so much of the order as directs him to turn over to the trustee the aforementioned books and records. By what manner or means the trustee could have ascertained the cost of the merchandise sold between January 1, 1939 and September 28, 1939 without the aid of these books and records is not set forth in the petition. It is difficult to fathom how the trustee could have done so, especially in view of the fact that the petitioner, who was president and sole active officer and stockholder of the bankrupt, was himself unable to do so.

Petitioner does not challenge the correctness of so much of the turnover order as relates to the missing books and records and the proceeds of the diamond ring (p. 2, *supra*). It is therefore unnecessary to state the facts upon which so much of the turnover order as relates to those items was based, or to discuss the law with respect thereto.

Petitioner's Specifications of Error

Petitioner's specifications of error Nos. 1 and 2 relate to the applicability of Section 21L of the Bankruptcy Act. As above pointed out, this question was not urged by petitioner before the Referee, the District Court or the Circuit Court of Appeals. This Court has uniformly refused to consider questions not previously raised in the case.

> *Sonzinsky* v. *United States*, 300 U. S. 506;
> *Waterloo Distilling Corporation* v. *United States*, 282 U. S. 577.

Petitioner's specification of error No. 3 is to the effect that the proof of the shortage was not established by

"clear and convincing" evidence. As has previously been pointed out, the shortage was established solely on the basis of the books and records of the bankrupt and its financial statement signed by petitioner. The correctness of none of the books, records or the financial statement upon which the finding of the shortage was based was challenged at the hearings.

Petitioner's specification of error No. 4 relates to the refusal of the courts below to accept the testimony offered on behalf of the petitioner. The Referee saw and heard the petitioner and his witnesses and came to the conclusion that "each of them is wholly unworthy of belief" (R 28a). The District Court, in its opinion, agreed with the Referee's conclusion that the petitioner and his witnesses were unworthy of belief (R 10a). The Circuit Court of Appeals, after a review of the evidence, held:

> "The Referee was entirely justified in disbelieving Gelbart (petitioner's principal witness) and Jeskowitz (petitioner)."

The Referee's determination on the question of the credibility of the petitioner and his witnesses, that determination having been concurred in by the District Court and the Circuit Court of Appeals, presents no question for review by this Court.

United States v. *Johnston,* 268 U. S. 220, 227;
Kellogg & Sons v. *Hicks,* 285 U. S. 502;
Boehmer v. *Pennsylvania Railroad Company,* 252 U. S. 496;
General Order in Bankruptcy 47.

The alleged errors in specifications of error Nos. 5, 6 and 7 relate to the use by the Referee of circumstantial evidence to sustain his findings that the petitioner was in possession of the bankrupt's missing property at the time of the assignment for the benefit of creditors, as well as at the date of the turnover order. These alleged errors will be discussed in the argument which follows.

Argument

I. The presumption of continued possession finds approval in decisions of this Court.

II. There is no conflict of authority within the Circuit Court of Appeals for the Second Circuit on the propriety of the use of the presumption of continued possession in turnover proceedings.

III. There is no conflict of authority on the question of the presumption of continued possession in the various Circuit Courts of Appeals.

POINT I

The presumption of continued possession finds approval in decisions of this Court.

It is rarely possible for a trustee to prove that a respondent in a turnover proceeding has actual physical possession of property belonging to a bankrupt at the time of the hearing. The trustee must necessarily attempt to prove the respondent's possession at the time of the hearing by evidence that on some previous occasion the respondent had the missing property. The trustee must then rely upon the reasonable presumption that the respondent still has possession of the property which he was shown to have had on the previous occasion.

Resort to the presumption works no undue hardship on the respondent. If, although he was in possession of the property on the previous date, the property is no longer within his possession or control, evidence to that effect is fully available to him. If he has placed it beyond his power

to deliver up the property which the proof shows that he possessed on the previous date, it is for him to show that he has done so and not for the trustee to show that he has not. This logic cannot be altered by the circumstance that in some cases the respondent's wrongdoing with respect to the bankrupt's property might have made it embarrassing for him to tell the truth. It is unfortunate for the respondent if he has so enmeshed himself in his own machinations that telling the truth would be "jumping from the frying pan into the fire." If in this unfortunate dilemma the respondent is deserving of a display of tenderness, certainly that tenderness should not go to the extent of robbing the trustee of the force of the presumption that the respondent still has the property of the bankrupt which the trustee showed that he had as of some earlier date.

The gist of petitioner's contention is that no turnover order should ever be made unless it is supported by direct evidence of possession of the missing property at the time the order is made. Petitioner does not content himself with the contention that the evidence should have shown his possession of the property at the time of the filing of the petition for the turnover order or at the time of the hearings. This appears from petitioner's continual reference to the fact that over three years elapsed between the time of assignment for the benefit of creditors and the Referee's turnover order. The proceedings for the turnover order were actually commenced within ten months after the petition in bankruptcy was filed (R 20a). The record will show that the lapse of two and a half years between the commencement of the turnover proceedings and the entry of the turnover order is attributable to the petitioner's applications for adjournments and to his vain and protracted efforts to concoct explanations for the shortage.

The present case furnishes a good illustration of the absurdity of petitioner's contention that there must be

proof of possession of the missing property at the moment of the making of the turnover order *dehors* the presumption. If the contention that the trustee cannot rely upon the presumption of possession were to prevail, it would have been incumbent upon the trustee not only to establish at every adjourned hearing of the turnover proceedings that the petitioner was presently in possession of the missing property, but also to have established that fact anew after the hearings had been closed at the moment preceding the making of the turnover order.

This Court has shown its approval of the use of the presumption of continued possession in turnover proceedings. In *Cooper* v. *Dasher,* 290 U. S. 106, the United States Supreme Court reversed an order of the Circuit Court of Appeals which had reversed an order of the District Court requiring the respondent to turn over property to the trustee in bankruptcy. As appears from the opinion of this Court, the proof of the shortage in that case was established by the records of the bankrupt. Some of the property was traced to the respondent. The trustee obtained a turnover order for the balance of the shortage. It is evident from the opinion of the Court that the turnover order was based upon the application of the presumption of continued possession. The Court held (p. 108):

> "The respondent has made away with goods belonging to the estate and defiantly withholds them. So the referee has found upon evidence not in the return and hence presumably sufficient. The process of computation and inference outlined in his report and leading up to his conclusion has support in many cases. See, e. g., Re H. Magen Co. (C. C. A. 2d) 10 F. (2d) 91, 93, 94, 7 Am. Bankr. Rep. (N. S.) 283; Re Chavkin (C. C. A. 2d) 249 Fed. 342, 41 Am. Bankr. Rep. 36; Re Stavrahn (C. C. A. 2d) 174 Fed. 330, 23 Am. Bankr. Rep. 168, 20 Ann. Cas. 888; Re Levy (C. C. A. 2d) 142 Fed. 442, 15 Am. Bankr. Rep. 166;

Sheinman v. Chalmers (C. C. A. 3d) 33 F. (2d) 902, 14 Am. Bankr. Rep. (N. S.) 374; Re Cohan (C. C. A. 3d) 41 F. (2d) 632, 16 Am. Bankr. Rep. (N. S.) 388."

All the cases cited in the foregoing excerpt authorize the use of the presumption of continued possession as a basis for a turnover order and a commitment order for contempt for failure to comply therewith.

In the leading case of *Oriel* v. *Russell,* 278 U. S. 358, this Court held that on an application to punish a respondent for having failed to comply with a turnover order, the turnover order is not subject to collateral attack. The Court accordingly further held that the respondent could not be permitted to show that he did not have the property at the time the turnover order was made but he would be permitted to show only that there had been some change in circumstances between the time of the turnover order and the application to commit him for contempt, which made it impossible for him to comply with the order. The effect of this holding is to apply to contempt proceedings based upon failure to comply with turnover orders the presumption of continued possession. If it may be validly presumed that a respondent in a proceeding to commit him for contempt, which directly involves his liberty, is in present possession of property which he was shown to have had at the date of the turnover order, there is no cogent reason why it may not be presumed in a turnover proceeding that the respondent is in present possession of property which he is shown to have had at the time of bankruptcy.

In his concurring opinion in *Robbins* v. *Gottbetter,* 134 F. 2d (C. C. A. 2nd) 843, Circuit Judge Augustus N. Hand pointed out, in answer to the criticism in the majority opinion of the use of the presumption of continued possession in turnover proceedings, that the use of such presumption is implicit in the decisions of this Court. He stated as follows (p. 844):

"I concur in the result reached by the majority. I see no ground, however, for protesting against a rule which I believe is implicit in the decisions of the Supreme Court in Oriel v. Russell (Prela v. Hubshman), 278 U. S. 358, 49 S. Ct. 173, 175, 73 L. Ed. 419. Though the appeal in Prela v. Hubshman was from a commitment order, the same question arose which confronts us here, namely, whether the bankrupt still remained in possession of the assets he was shown to have withheld from his trustee. The turnover order in Prela v. Hubshman was made about twenty months after the date of the petition in bankruptcy and the commitment order about fourteen months after the date of the turnover order. Nevertheless, all the justices of a court of which those exceptionally alert guardians of civil rights, Justices Holmes, Brandeis and Stone, were members, unanimously concurred in the opinion of Chief Justice Taft, which quoted with approval the remarks of Judge McPherson of the Third Circuit in Re Epstein, 206 F. 568, 569, and concluded by saying:

'In the two cases before us, the contemnors had ample opportunity in the original hearing to be heard as to the fact of concealment, and in the motion for the contempt to show their inability to comply with the turnover order. They did not succeed in meeting the burden which was necessarily theirs in each case, * * *.'"

It clearly appears from the decisions of this Court in *Cooper* v. *Dasher, supra* and *Oriel* v. *Russell, supra,* that the presumption of continued possession in turnover proceedings has the approval of this Court.

POINT II

There is no conflict of authority within the Circuit Court of Appeals for the Second Circuit on the propriety of the use of the presumption of continued possession in turnover proceedings.

There is not any dispute in the Circuit Court of Appeals for the Second Circuit that the requirement that the trustee must prove the ability of the respondent to comply with the turnover order can be satisfied by proof that the respondent had possession of the property at the time of bankruptcy, coupled with the presumption of continued possession.

In *Danish* v. *Sofranski,* 93 F. 2d 424, the Circuit Court of Appeals for the Second Circuit introduced an exception to that rule by holding that where the respondent acknowledges the original taking, it is then incumbent upon the trustee to prove, without the aid of the presumption of continued possession, how much of the property remains in the hands of the respondent at the time the turnover order is sought.

In *Pinsky-Lapin & Co.,* 98 F. 2d 776, *Danish* v. *Sofranski, supra,* to the extent that it introduced the exception above indicated, was overruled. In the later case of *Seligson* v. *Goldsmith,* 128 F. 2d 977, Judge Learned Hand stated (p. 978):

> "In Danish v. Sofranski, 2 Cir. 93 F. 2d 424, we tried to prick a path—not it is true guided by seamless logic, as we observed at the time—in the hope of finding something which would harmonize the decisions; but by a divided court we later overruled this attempt in Re Pinsky-Lapin & Co., 2 Cir., 98 F. 2d 776, and it was better that we did."

It is clear from the foregoing that there is no conflict in the decisions of the Circuit Court of Appeals for the

Second Circuit, regarding the use of the presumption of continued possession in turnover proceedings. *Danish* v. *Sofranski, supra,* which marked a departure from previous decisions, has been expressly overruled.

Moreover, the correctness of the principle laid down in *Danish* v. *Sofranski, supra,* is in no way involved in the present case. The factor which prompted the Circuit Court to attempt to lay down a special rule, namely, acknowledgment of the original taking, is lacking in the present case. In the present case, the petitioner has at all times denied the original taking. Whatever logic might have justified the rule in *Danish* v. *Sofranski, supra,* which refused to apply the presumption where the original taking is admitted, does not apply where the original taking is denied.

Petitioner, in protesting the use of the presumption of continued possession, is attempting to blow hot and cold at the same time. His contention that the lapse of time destroys or weakens the force of the presumption implies that he has disposed of the property or has placed it beyond his control since the filing of the petition for the turnover order while in his answer and at the hearings he emphatically and unequivocally denied that the property had ever come into his possession.

POINT III

There is no conflict of authority on the question of the presumption of continued possession in the various Circuit Courts of Appeals.

Petitioner contends that there is a conflict of authority among the Circuit Courts of Appeals on the question of the presumption of continued possession, and that the Circuit Courts of the Fifth, Seventh and Eighth Circuits entertain a view on the question contrary to that of the Second Circuit. Petitioner cites and relies upon one case

in each of the Fifth, Seventh and Eighth Circuits to support his claim.

Marrin v. *Ellis,* 15 F. 2d (C. C. A. 8th) 321, relied upon by the petitioner, does not support his claim that there is a conflict between the Eighth Circuit and the Second Circuit. The rule of the presumption of continued possession has been followed by the Eighth Circuit in decisions both prior and subsequent to *Marrin* v. *Ellis, supra.*

See:

In re Meier 182 F. (C. C. A. 8th) 799;
Reiss v. *Reardon,* 18 F. 2d (C. C. A. 8th) 200.

In re J. L. Marks, 85 F. 2d (C. C. A. 7th) 392, relied upon by petitioner, does not discuss the question of the presumption of continued possession.

In re Samel v. *Dodd,* 142 F. (C. C. A. 5th) 68, does not support petitioner's claim. The excerpt quoted at page 19 of petitioner's brief is taken from the opinion of Judge SHELBY, which was not concurred in by a majority of the Court. The case did not in any way involve the presumption of continued possession. The Court there merely held that a respondent could not be required to turn over to the trustee the value of the bankrupt's property in his possession, but only the property itself.

All the decisions relied upon by petitioner in support of his contention that there is a conflict of authority in the Circuit Courts of Appeals antedate the enactment of Section 21L of the Bankruptcy Act. Section 21L, creating, for the purposes of a turnover proceeding, the presumption that the bankrupt's property was sold at not less than cost, was enacted in 1938.

The enactment of this Section was a clear legislative recognition of the presumption of continued possession, for

it was enacted for the purpose of assisting the trustee to establish a shortage upon the basis of the bankrupt's books and records. (See Report of the House Committee on the Judiciary, July 29, 1937, p. 26.) The statute would be rendered nugatory if a showing of actual physical possession at the time of the turnover order was necessary. There is never any necessity of resort to the presumption of 21L when actual physical possession at the time of the turnover order can be shown. Petitioner's argument would therefore lead to the *reductio ad absurdum* that a trustee may have the benefit of the presumption of 21L when and only when it is superfluous to his proof.

CONCLUSION

The petition for a writ of certiorari should in all respects be denied.

New York, N. Y., Nov. 28, 1944.

Respectfully submitted,

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